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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1523

RICHARD W. HUNT, ... *Appellant*

vs.

ROBERT E. McNAIR, Governor of the State of South Carolina, et al., ... *Appellees*

On Appeal from the Supreme Court of South Carolina

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES

DANIEL R. McLEOD,
Attorney General
Columbia, South Carolina
Counsel for Appellee, Budget and Control Board of the State of South Carolina

HUGER SINKLER
THEODORE B. GUÉRARD
2 Prioleau Street
Charleston, South Carolina 29401
Counsel for Appellee, Baptist College at Charleston

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Pursuant to Rule 16 of the Rules of this Court, the Appellees move the Court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument or, in the alternative, to affirm the judgment below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the decision of the Supreme Court of South Carolina that no further review by this Court is necessary.

I.

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the constitutionality of the South Carolina Educational Facilities Authority Act, Section 25 of Act No. 349 of the Acts of the General Assembly of South Carolina for 1969, 56 S.C. Statutes at Large 603, (the Act), as implemented by the Rules and Regulations promulgated thereunder.

The Act declares, among other things, that it is essential that private institutions for higher education in the State be given appropriate additional means for the education of the youth of the State, further, the purpose of the Act is to afford a measure of assistance to enable private institutions for higher education to provide the facilities and structures which are sorely needed to accomplish the various objectives set out in the Act (Act Par. A). As the instrument for accomplishing this purpose, the Act created the South Carolina Educational Facilities Authority, (the Authority), consisting of the members from time to time of the State Budget and Control Board, *ex officio*, and all functions and powers of authority are granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State. (Act Par. D). The Authority is to operate on a self-sustaining basis by selling revenue bonds which shall be payable solely out of revenues of the Authority derived from the particular project for which the bonds are issued, and which shall be bound to and operated by a private institution of higher learning.*

On February 2, 1971, the Authority under paragraph E(a) of the Act adopted Rules and Regulations, and the record in

this action was enlarged by Order dated October 12, 1971 to include the Rules and Regulations which appear as Appendix C in Appellant's Jurisdictional Statement. The Rules and Regulations include a requirement that every lease entered into by the Authority under the Act shall contain a covenant enforceable by a proceeding in any court of competent jurisdiction at the instance of the Authority, the Attorney General or any taxpayer of the State, that neither the leased land or any facilities located thereon shall be used for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination. The Rules and Regulations also provide that if a lease agreement contains a provision permitting the institution to repurchase the facilities upon payment of the bonds, the deed of reconveyance from the Authority shall be made subject to the condition that no facility on the leased premises financed in whole or in part with the proceeds of the bonds shall be used for sectarian instruction or as a place of religious worship or used in connection with any part of the program of a school or department of divinity of any religious denomination, provided that this condition may provide at the option of the institution that if the leased premises shall become the subject of an involuntary judicial sale as a result of any foreclosure of any mortgage or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale (other than the institution) shall be in fee simple, free of the said condition applicable to the institution or any voluntary grantee thereof.

B. The Proceedings Below

This action was instituted in the Charleston County Court of Common Pleas wherein the Plaintiff, a taxpayer of the State of South Carolina and a resident of Charleston County,

filed his complaint on March 20, 1970 for the purpose of (a) contesting the constitutionality of the Act, and (b) in the event the Act shall be held constitutional, prohibiting its use for the benefit of appellee, Baptist College at Charleston and any other institution of higher learning in whole or in part under the direction or control of any church or church-related organization.

The Baptist College has applied to the Authority for the issuance of revenue bonds pursuant to the Act in an amount not exceeding $3.5 million for various purposes including refunding an outstanding indebtedness of the College in the amount of $2.5 million. In accordance with the provisions of the Act, the College proposes to convey substantially all of its campus (not including any portion used for religious purposes) to the State of South Carolina at no cost to the State, the Authority leasing the said property back to the College by lease agreement whereby the College will be obligated to operate and maintain the leased property as an institution of higher learning, and to pay the Authority rentals in an amount sufficient to meet the payments of principal and interest as they become due on the proposed revenue bonds, which bonds would be further secured by a trust indenture between the Authority and a bank, which indenture would constitute a foreclosable lien on the property conveyed to the State. Preliminary approval of this financing arrangement has been granted by the Authority, and the Plaintiff seeks to enjoin any further action by the Defendants pursuant to the Act on the grounds, *inter alia*, that the Act, in providing for aid for all colleges, including private, church affiliated colleges, violates the provisions of Article I, Section 4 of the South Carolina Constitution which prohibits the South Carolina General Assembly from making any law respecting an establishment of a religion or prohibiting the free exercise thereof, and

the First Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment.

The Defendants filed answers generally contending that the Act is constitutional and that the proposed actions of the Authority for the benefit of the Baptist College violate no constitutional provisions. After hearing arguments of counsel and on the basis of the pleadings, the Circuit Court handed down its decree dated May 1, 1970 wherein the constitutionality of the Act was sustained, and likewise the proposed action of the Authority thereunder for the benefit of the Baptist College. The Supreme Court of South Carolina in a unanimous opinion affirmed 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Judgment of the Supreme Court of South Carolina was appealed by the Appellant to the Supreme Court of the United States wherein Appellant contended that the Act contravenes the Establishment and the Free Exercise Clauses of the First Amendment as applied to the financing arrangement to be effected by the Authority at the instance of the Baptist College.

On June 28, 1971, the Supreme Court of the United States entered the following order in this action:

> "The judgment is vacated and the case is remanded to the Supreme Court of South Carolina for reconsideration in light of this Court's decisions in *Lemon, et al, vs. Kurtzman, et al.*, 403 U.S. 602, *Tilton, et al. vs. Richardson, et al.*, 403 U.S. 672, *Earley, et al. vs. DiCenso, et al.*, 403 U.S. 602, and *Robinson et al. vs. DiCenso, et al.*, 403 U.S. 602, decided June 28, 1971. Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set for oral argument."

Hunt vs. McNair, 403 U.S. 945 (1971).

Pursuant to the remand the parties filed briefs with and argued orally before the Supreme Court of South Carolina which again, in an opinion filed on March 2, 1972, affirmed the judgment of the lower court denying the relief sought by the Appellant. An appeal from this decision has been filed in this Court, and the within motion is directed at such appeal.

II.

ARGUMENT

The Case Does Not Present a Substantial Question

Appellees respectfully submit that the question as presented in the Jurisdictional Statement at page 4 thereof is not in keeping with Rule 15.1(c) of this Court which requires that the same be short and concise, for the question as presented is wordy, all encompassing, argumentative and inclusive of a subsidiary question set forth therein. In any event, such subsidiary question, *viz.*, the ability of the Baptist College to refinance, out of the proceeds of the proposed bonds, outstanding bonded indebtedness incurred by the College for the construction of buildings and facilities, is a matter which rests in the absolute discretion of the State of South Carolina as a matter of State interest only. Appellee finds no jurisdictional basis whatsoever for the consideration by this Court of such subsidiary question.

As to the principal question, Appellees submit that this case is not one which involves outright aid to a church-related institution. As pointed out above, the Act provides a needed financing service to all institutions of higher education, public or private.

It has been the position of Appellees throughout this litigation that the State may expend its funds in a manner which benefits sectarian institutions as an incident to the benefit conferred on society generally.

In *Cochran, et al v. Louisiana State Board of Education*, 281 U.S. 370 (1930), this Court had before it for consideration the question of the validity of a Louisiana statute providing free school books to school children, the contention being that such purpose was the taking of private property for private purposes. The Court observed that the children who were to utilize the books attended some school, public or private, the latter sectarian or non-sectarian, and that the books were to be furnished them for their use free of costs no matter what school they might attend. The Court further observed that the statute contemplated that the same books that are furnished children attending public schools shall be furnished children attending private schools. In upholding the statute, this Court made the following statement: "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Similarly, in *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court held that the State of New Jersey could reimburse parents for the cost of their children's bus transportation to schools, including sectarian schools, even though, as the court recognized, such aid helped children attend church schools and made it possible for some to attend who otherwise might not. Moreover, in *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court held that a State could lend secular textbooks to children in parochial schools free of charge even though free textbooks might make it more likely that some children would attend a sectarian school who otherwise would

not, and ". . . relieve those churches of an enormous aggregate cost for those books." It is interesting also to observe that a State may provide a sectarian institution with general services such as police and fire protection even though such services are paid for out of a real property tax levy and the property of the sectarian institution is exempt from taxation. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

This case is clearly distinguishable from the decisions of the Supreme Court of the United States decided June 28, 1971, and set forth in the order remanding this case to the Supreme Court of South Carolina, of *Lemon, et al vs. Kurtzman*, 403 U.S. 602; *Earley, et al vs. DiCenso, et al*, 403 U.S. 602; *Robinson, et al vs. DiCenso, et al*, 403 U.S. 602. The *Lemon* case involved the payment of funds to cover the cost of teachers' salaries, text books and instructional materials directly to sectarian secondary schools, and the *DiCenso* cases involved the use of state funds to supplement the salaries of teachers in church operated elementary schools. In those cases the United States Supreme Court found that the continuing state involvement and surveilance fostered excessive entanglement between the government and religion. In this case, on the other hand, there is no such involvement and surveilance on the part of the state under the proposed financing plan of the Baptist College. The opinion of the South Carolina Supreme Court points out the true role of the State as "a passive and very limited role in the implementation of the Act serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act on a tax free basis." Hunt v. McNair, ___ S.C. ___, 187 S.E. 2d 645 (1972) Thus, the financing plan now before the Court comes within the type of state aid sustained in *Tilton, et al vs. Richardson, et al*, 403 U.S. 672, where the United

States Supreme Court sustained federal grants to sectarian institutions for the purpose of financing neutral non-sectarian facilities and, in fact, as stated by the South Carolina Supreme Court, in this case there is "less potential for experiencing the substantive evils" against which the religious clauses were intended to protect.

Thus, *Everson*, *Allen* and *Tilton* govern the decision on the issue presented here and render the question presented so unsubstantial that any further consideration by this Court is unnecessary.

III.

CONCLUSION

Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of South Carolina.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General
Columbia, South Carolina
Counsel for Appellee, Budget and Control Board of the State of South Carolina

HUGER SINKLER
THEODORE B. GUÉRARD
2 Prioleau Street
Charleston, South Carolina 29401
Counsel for Appellee, Baptist College at Charleston